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No. 96-1337

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT and JAMES EVERETT SMITH,

Petitioners,

vs.

TERI LEWIS and THOMAS LEWIS, Personal Representative of the Estate of PHILIP LEWIS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONERS' VERSION OF THE FACTS IS INACCURATE

In a hyperbolic rendition of the "facts", Petitioners have inappropriately included material that was not cited in the Ninth Circuit opinion. In so doing, Petitioners seek inappropriately to justify Officer Smith's conduct by relating his thoughts and other "facts" Petitioners apparently believe mitigate his responsibility for young Philip Lewis' death. Respondent respectfully requests this Court to consider only the facts as relied upon by the court below.

In addition, Petitioners never mention that Officer Smith *killed* 16 year old Philip. Rather, they hide behind the euphemism that he "died of his injuries". Most people would die of their injuries if, as an unprotected passenger/pedestrian, they were hit by a police car skidding out of control at 65 miles per hour rupturing virtually every organ and breaking every bone in their body.

Respondents are further troubled by Petitioner's inaccurate and misleading citations to the Appendix. *See* Petition, page 6.

REASONS FOR DENYING THE WRIT

Petitioners' position is flatly incorrect — the decision below is in accordance with the body of law that has developed governing violations of substantive due process under the Fourteenth Amendment, both in this Court and in the other circuits. Any difference between the decision of the Ninth Circuit, this Court and/or any of the other circuits is inconsequential and does not warrant review by this Court.

I.

THERE IS NO CONFLICT JUSTIFYING THE GRANT OF CERTIORARI.

Petitioners invoke the "in conflict" provision of Rule 10 to support their petition for review as to the standard for determining a violation of substantive due process under the Fourteenth Amendment. However, Petitioners have relied upon a superficial reading of the holdings of the cases they cite. A careful analysis of these cases shows that there is no such conflict.

II.

REVIEW IS NOT WARRANTED; THE STANDARD OF CARE NECESSARY TO PROVE A VIOLATION OF SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT ARTICULATED BY THE NINTH CIRCUIT IS BOTH SOUND AND UNCONTRADICTED.

A. There Is No Conflict With This Court.

There is no conflict between the decision in the court below and any decisions of this Court. This Court has never addressed the minimum standard for establishing a constitutional violation occurring because of a high speed police pursuit. The cases in which this Court has addressed instances of wrongdoing of constitutional dimensions have been in other contexts. The decision of the lower court in this case is entirely consistent with those holdings.

Petitioners cite a single opinion by this Court which they claim contradicts the lower court's decision, *Collins v. City of*

Harker Heights, Texas, 503 U.S. 115, 112 S. Ct. 1061 (1992). In that case, this Court commented that in order to justify an expansion of liability to a municipality for violation of the due process clause of the Fourteenth Amendment, the conduct in question must be "arbitrary or conscience shocking". *Collins*, 503 U.S. at 128. Petitioners, however, in a Procrustean attempt to amputate the part of this Court's test which does not fit their argument, claim that only conduct which is "conscience shocking" violates substantive due process. Petitioners totally ignore this Court's comment that arbitrary conduct is likewise constitutionally impermissible.

In *Collins*, this Court said that it was not persuaded that the alleged failure by the City of Canton to train its employees ". . . can properly be characterized as arbitrary or conscience-shocking . . ." *Collins*, 503 U.S. at 128. Petitioners have excised only the "conscience-shocking" portion of that phrase, arguing that this is the test that the Ninth Circuit should have applied to Officer Smith's actions. Petitioners do not explain why they have deleted the words "arbitrary or" from their argument.

In addition, the *Collins* case does not set a standard to judge whether the conduct of individual police officers violated substantive due process rights. Rather, the case addresses the necessary dichotomy between constitutional violations on the one hand and common law tort claims on the other. Furthermore, it does so, not as to the individual liability of public employees to members of the public, but only as to the very narrow question of liability of a municipality to one of its own employee and in the context of *extending* Fourteenth Amendment protection to a right to proper training.

Petitioners cite only the second half of the test they claim was developed by this Court in *Collins*. They completely ignore the first part, which they apparently find not to conflict with the "deliberate indifference" standard in the opinion below.

Either the phrase "arbitrary or conscience-shocking" is one category of conduct or two. Either way, this standard does not conflict with the "deliberate indifference" test in the court below.

If the phrase describes a single category, then this Court equated governmental conduct which is arbitrary with conduct which is conscience-shocking. Clearly, police conduct that is deliberately indifferent to the constitutional rights of individuals is arbitrary. The word "arbitrary" is defined by Black's Law Dictionary, Sixth Edition, Centennial Edition, 1991, page 104, as "[i]n an unreasonable manner, as fixed or done capriciously or at pleasure. Without adequate determining principle . . ." and by Webster's Ninth Collegiate Dictionary, Merriam Webster, Inc. 1987, page 99, as "depending on individual discretion . . . and not fixed by law . . . based upon or determined by individual preference or convenience rather than by necessity of the intrinsic nature of something . . ." Clearly, these definitions ring of conduct done by a government in "deliberate indifference" to the rights of the governed, especially in this case where the officer was admittedly out of compliance with his own department's policy.

If the phrase defines two separate categories, then there is no rationale for concluding that "arbitrary" is an inadequate level of wrongful conduct to support a constitutional claim, while the conduct stated in the alternative to it, "conscience-shocking", is constitutionally sufficient. To conclude otherwise would be to render the phrase internally inconsistent and contradictory.

Neither can it be said that constitutionally impermissible conduct must be both arbitrary *and* conscience-shocking to be actionable. The terms are joined by the disjunctive "or" in *Collins*. Furthermore, there is no mention in *Collins* that this Court was departing from its previous holding in *Daniels v.*

Williams, 474 U.S. 327, 106 S. Ct. 662 (1986), where it was observed that "[t]he touchstone of due process is protection of the individual against *arbitrary* action of government". *Daniels*, 474 U.S. at 331 (emphasis added). Accordingly, it appears that the addition in *Collins* of "or conscience-shocking" is a mere amplification of, not material change to, this Court's holding in *Daniels*.

Likewise, Petitioners' argument that the Ninth Circuit erred in relying on this Court's decision of *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989) is misplaced. This is a discretionary writ, not an appeal. This is neither the time nor the place for Petitioners to argue that the decision of the court below was wrong. Yet, Petitioners' argument about the Ninth Circuit's reliance on *Harris* is just that: an assignment of error for adopting a "deliberate indifference" standard. They base their argument in part on the fact that the deliberate indifference test enunciated in *Harris* involved injury in a custodial context. The harmony of holdings between these decisions, while they may not be music to Petitioners' ears, is the exact opposite of the discord necessary under Rule 10 for this Court's discretionary review.

B. There Is No Conflict Within The Circuits.

Petitioners list three circuit court cases which they claim conflict with the opinion below. These cases, *Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996); *Fagan v. City of Vineland*, 22 F.3d 1296 (3rd Cir. 1994) (en banc) and *Temkin v. Frederick County Commissioners*, 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) are not in conflict with this case for two reasons: (1) the standard discussed in the First, Third and Fourth Circuit cases is *mere dicta;* and (2) there is no fundamental difference between "deliberate indifference" and "shocks the conscience".

1. A Conflict In Dicta Is Not An "Important Matter" Under Rule 10.

Rule 10 reflects this Court's concern that its discretionary powers not be invoked unless a conflict exists regarding an "important matter". Here, the "conflict" in the decisions in the First, Third, Fourth and Ninth Circuit is more illusory than real. The actual holdings of these circuits are tied together by a key consensus: liability for constitutional torts requires conduct more culpable than mere negligence.

A close review of the *Evans*, 100 F.3d 1033 at 1038 (decision to engage in "hot pursuit" was "no more than mere negligence"); *Fagan*, 22 F.3d 1296 at 1307 (decision to pursue was not arbitrary but merely a mistake); and *Temkin*, 945 F.2d 716 at 723 (officers' conduct was "lacking in judgment"), reveals that each of those cases found that, under the circumstances present, the pursuing officers were no more than negligent. This fact alone compelled a finding of no liability. Thus, in each of these three cases, the courts' discussion of the relative merits of one extra-negligence standard over another was mere dicta. Only in the Ninth Circuit decision in *Lewis* did the court find that the governmental conduct, at least for purposes of summary judgment, potentially went beyond mere negligence, allowing for a jury determination on this point.

As has been observed by the authors of Legal Method. Foundation Press, 1980, "[i]t is a cardinal tenet of the Anglo-American judicial system that the best result will be produced through the 'fire of controversy' . . . Dicta are pronouncements on points that need not be considered in order to reach a decision . . ." Clearly, when conduct does not rise above a universally agreed-upon floor, what more egregious conduct would have sufficed is immaterial, was not in controversy and need not have been addressed by these courts.

Respondents, therefore, respectfully submit that there can be no genuine conflict between the circuits, since the Ninth Circuit in the case below is the only court to have issued an opinion directly holding what standard is to be applied in police pursuit cases when, as a matter of law, the officer's conduct amounts to more than mere negligence.

2. Deliberate Indifference/Shocks The Conscience: A Distinction Without A Difference.

Based upon the above discussion concerning the definition and use of the word "arbitrary" by this Court, it is clear that there is no appreciable difference between "arbitrary" and "deliberate indifference" as standards for judging constitutional violations. Since "arbitrary" and "shocks the conscience" have also been used disjunctively by this Court in the constitutional context, there can be no meaningful distinction between "shocks the conscience" and "deliberat indifference".

That these terms can be used interchangeably in triggering Constitutional liability is supported by common sense. While intentional misconduct shocks the conscience of the civilized in society (or should if we have not become accustomed to it), so too does a government's arbitrary or deliberate indifference to the rights of its citizens.

The relationship between those who govern and those who are governed makes conduct by the former that is less than intentional more egregious to the latter than if a private citizen engaged in the same conduct. Arbitrary or deliberately indifferent conduct by a stranger can be passed off as unfortunate, but not outrageous. However, when such conduct comes from the very group that is paid by the citizenry to provide protection from that type of conduct under color of law, it shocks the conscience. "Shocks the conscience" is therefore, not a test

separate and apart from "arbitrary" or "deliberate indifference". It is simply another way of describing such conduct.

It is shocking that Amici will go even further than Petitioners to grant police officers constitutional immunity for all harm caused while engaged in official duties except for liability under the Fourth Amendment for deliberate seizures. Amici assert this position on the pretext that the Constitution must add " 'a substantial increment of protection' " not otherwise available under the Bill of Rights. (County Amici Brief, p. 17.) This argument fails for two reasons. First it is the Bill of Rights which guarantees the rights to Life and Liberty which rights are then incorporated in the Fourteenth Amendment. Second, Amici contend that California State law immunizes officers during high-speed chases, which would render the Fourteenth Amendment the *only* protection afforded victims like Philip Lewis.

III.

REVIEW IS NOT WARRANTED; THERE IS NO RULE 10 CONFLICT REGARDING QUALIFIED IMMUNITY.

Petitioners' argument supporting their request for review of the decision of the court below denying qualified immunity for Officer Smith is fatally flawed. Rule 10 does not support review except where there are decisions in conflict on the *same* "important matter". Here, there are no other cases on the issue of qualified immunity in this context with which the Ninth Circuit opinion could conflict.

In an attempt to create a conflict, Petitioners review cases that Officer Smith could have been guided by in 1990 and assert that these cases are so inconsistent that the law was unclear.

However, the most that Petitioners' argument shows is that Officer Smith must have been aware that his conduct *could* be held violative of the Fourteenth Amendment which, of course, is exactly what the Ninth Circuit concluded. It is not necessary that Officer Smith had to know that liability was an absolute certainty.

The fact that there were varying results in cases brought against police officers prior to May, 1990 does not create the conflict envisioned by Rule 10 to trigger review by this Court. Without a true Rule 10 conflict, discretionary review by this Court is not warranted.

IV.

REVIEW IS NOT WARRANTED: SINCE AT LEAST 1990, A REASONABLE POLICE OFFICER CLEARLY KNEW THAT RUNNING DOWN AND KILLING A PASSENGER ON A MOTORCYCLE WITH A POLICE VEHICLE DURING A HIGH SPEED CHASE VIOLATED THE FOURTEENTH AMENDMENT RIGHTS OF THAT PERSON.

Petitioners seek review on the ground that the law regarding police officer liability needs to be clarified. Yet, Petitioners do not cite authority for such a basis for review. Furthermore, "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury" *Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994). Furthermore, the cases prior to May 1990 were sufficient to establish conduct during a high speed pursuit as potentially violative of the Fourteenth Amendment.

While it is true that the reasons listed in Rule 10 are not, by their very terms, exhaustive, it is also true that Rule 10 is not designed to promote advisory opinions. Since there is no conflict

between the decision below, decisions of this Court or decisions of any circuit, discretionary review by this Court is not warranted.

CONCLUSION

Petitioners have wholly failed to present any basis under Rule 10 for this Court to grant its Petition. Petitioners are attempting to obtain an appeal of the partial reversal of the district court's order granting their Motion for Summary Judgment. The Petition should be denied.

Respectfully submitted,

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